NO. 80-1269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY JIMMY GIDDENS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

JOHN C. WALDEN
Senior Assistant
Attorney General
Counsel of Record for Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

MARY BETH WESTMORELAND
Assistant Attorney General

VICKERS NEUGENT
District Attorney

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339

QUESTION PRESENTED

1.

Whether the Court of Appeals of Georgia properly determined that there was no reasonable expectation of privacy concerning the field and shed.

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PART ONE

STATEMENT OF THE CASE

Petitioner, Ray Jimmy Giddens, was indicted during the February Term, 1979, in the Superior Court of Berrien County, Georgia. Prior to

trial, a motion to suppress was filed and a hearing was conducted on that motion. After considering the evidence, the trial court overruled the motion to suppress. At the conclusion of the trial, the Petitioner was convicted of the offense of possession of marijuana with intent to distribute and was sentenced to ten years imprisonment with the last four years of that sentence to be served on probation. Petitioner also received a $5,000.00 fine and was ordered to pay court costs as a condition of his probation.

The evidence admitted at the hearing on the motion to suppress and at trial indicated that law enforcement officers were conducting investigations into drug related activities in Berrien County and Lowndes County, Georgia, which are adjoining. After Petitioner was seen visiting a residence which the authorities

had under surveillance, he was followed to a field which was later discovered to be in Berrien County. The officer following the Petitioner inquired at the Georgia Sheriff's Boys Ranch, which is located next to the field and learned the Petitioner's identity.

The next day, additional officers returned to the field based on the officer's report. The testimony indicated that the field was surrounded by a barbed-wire fence. Photographs indicated that the fence contained four strands of wire. Testimony also indicated that there was a gate on the fence, but the testimony was conflicting as to whether the gate was locked at the time the officers entered. The officers testified they did not enter by way of the gate, but either crawled through the fence, or climbed over it. Although photographs introduced by the defendant show a no trespassing sign on a

tree near the gate, testimony by the officers indicated that they did not see this sign at the time they entered the field. Further testimony indicated that there was evidence to show that the sign may have been placed on the tree after the officers entered the field.

At trial, Petitioner introduced several witnesses who testified that Petitioner had invited them out to this same field. Three witnesses actually accepted the invitation and went to the field with one witness going five times. Each of these witnesses testified that the gate to the field had not been locked.

Although a building was located on the field, the uncontroverted evidence presented at trial shows that there were no personal items or facilities for sleeping in this building. Officers also testified that there were no personal papers or belongings in the building, but merely a shed containing tools and marijuana.

Officers testified that they began an observation of the field based on this discovery. Petitioner was arrested after the officers believed that he had discovered their presence and their observation of the field.

On direct appeal to the Court of Appeals of Georgia, Petitioner raised, among other allegations, the question of the legality of the search of the field and the shed. The Court of Appeals of Georgia affirmed the conviction finding that there was no reasonable expectation of privacy under the circumstances in this case. Giddens v. State, __ Ga. App. __, Case No. 60223 (October 10, 1980). Petitioner filed a motion for rehearing in the Court of Appeals of Georgia which was denied on October 28, 1980. Petitioner then filed an application for certiorari in the Supreme Court of Georgia to review the judgment of the Court of Appeals. This application was

denied on November 26, 1980. Petitioner has now filed the instant petition with this Court again seeking review of the issues decided in the state courts.

Further facts will be developed as necessary for a more thorough consideration of the issues raised by the present petition.

PART TWO

REASON FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS OF GEORGIA PROPERLY FOUND THAT THERE WAS NO REASONABLE EXPECTATION OF PRIVACY IN REGARD TO ITEMS FOUND IN THE FIELD IN THE INSTANT CASE.

Petitioner has placed great emphasis on the holding of this Court in Katz v. United States, 389 U.S. 347 (1967), and its effect on the so called open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1924). Petitioner attempts to have this Court grant certiorari to resolve alleged confusion in the continuing viability of the open fields doctrine after Katz. Respondent asserts that there is no existing confusion as to the application of this doctrine, nor

did the decision in Katz preclude the use of the open fields doctrine.

In this Court's opinion in Hester v. United States, supra, the Court noted that "the special protection accorded by the Fourth Amendment to the people in their persons, houses, papers and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Hester, supra at 59. Subsequently, in this Court's decision in Katz v. United States, this Court emphasized that the Fourth Amendment protects people and not places. Under Katz, there are two requirements that must be met, that is, that a defendant have exhibited an actual subjective expectation of privacy and that the expectation be one that society is prepared to recognize as reasonable. Katz, supra at 362.

In upholding the continued use of the open fields doctrine, the Fifth Circuit Court of Appeals noted that "although the expectations test has done away with outmoded property concepts no longer satisfactory for fourth amendment analysis [cites omitted] the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations." United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978). The Court went on to note that it still would hold that open fields surrounding a house would not be protected under the Fourth Amendment.

Petitioner cites a case from the Ninth Circuit Court of Appeals in an attempt to show confusion on the part of the various circuits. The case cited by the Petitioner, Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968), was cited in a later decision by that same

Court in which the open fields doctrine was utilized. The Court in Wattenburg was specifically considering an area immediately adjacent to a residence. The Ninth Circuit later held that information gained as a result of a trespass on an open field area is not unconstitutional. United States v. Capps, 435 F.2d 637, 640 (9th Cir. 1970).[1]

Clearly, courts have continued to recognize the viability of the open fields doctrine and have applied it using the rationale set forth by this Court in Katz. The courts have used the idea of an open

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1/ Both the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals have continued to recognize the viability of the open fields doctrine. See United States v. Basile, 569 F.2d 1053 (9th Cir. 1978), cert. den. 436 U.S. 920; Ehlers v. Bogue, 626 F.2d 1314 (5th Cir. 1980).

field to determine what actually constitutes reasonableness, that is, what society is prepared to recognize as reasonable.

Respondent submits that under the facts of the instant case, even though the Petitioner may have manifested a subjective expectation of privacy in the marijuana plants discovered on the field and in the shed, that expectation was not one that fits the requirements of reasonableness as set forth in Katz. The Court of Appeals of Georgia noted that "The wire fence of a type commonly used to restrict movement of livestock posed little obstacle to the entrance of law enforcement officers who were only later aware that the gate to the field was locked. The officers received no notice prior to their entry that the owner or rightful occupant forbade such entry." Giddens v. State, supra. Although

there was a barbed-wire fence surrounding the field, clearly in a rural county, this is more often intended as an impediment to lifestock rather than people. Furthermore, a barbed-wire fence does not present any barrier to observing any activity on the field. The officers testimony that there was not a "no trespassing" sign at the time of their entry further establishes the fact that there was no reasonable expectation of privacy in this area.

In United States v. Williams, supra, the Fifth Circuit Court of Appeals addressed the question of law enforcement officers crossing a fence. That Court had noted that it had not considered the crossing of a fence significant unless the area included the house of the individual. Although at the time of the search in Williams, the fence had become

somewhat broken down, the fact situations are still analogous. The Fifth Circuit Court of Appeals noted that "The fence in question here was not a privacy fence or an exclusionary one; in its best days, it was meant to do no more than keep the hogs in, not to keep anyone out. . . . We think that the fence was not such as to create either any reasonable expectation of added privacy or to join the still shed to or separate it from the residences." United States v. Williams at 454. Similarly, the fence in the instant case did not appear to be one designed to keep people out. It did not offer any impediment to vision and offered only minimal impediment to ingress. Thus, Respondent asserts that any expectation of privacy Petitioner may have had to this area was completely unreasonable considering the particular facts of this case.

There is also some question as to the actual subjective expectation of privacy on the part of the Petitioner. As noted previously, numerous individuals were invited to visit the field and did visit the field on various occasions. These witnesses all testified that the gate had not been locked when they visited the area. Furthermore, the law enforcement officials testified that the marijuana plants were growing several feet higher than the dead or dying corn plants around them. Based on this information, the expectation of privacy on the part of the Petitioner is highly questionable.

Respondent asserts that based on the facts in this case, there was no reasonable expectation of privacy on the part of the Petitioner to the field involved. If the Hester doctrine is applied, it is clear that this is an open field and that there is no

Fourth Amendment protection extended to this area. Even were this Court to determine that the Hester doctrine does not extend a per se exclusion of areas from Fourth Amendment protection, it is clear that under the facts of the instant case, the requirements set forth in Katz v. United States, have not been met. Thus, there was no Fourth Amendment violation on the part of any law enforcement officers. This Court should decline to grant certiorari as there has been no federal constitutional violation presented for review.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Ray Jimmy Giddens.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

132 State Judicial
Bldg.
40 Capitol Square, SW
Atlanta, Georgia 30334

DON A. LANGHAM
First Assistant Attorney
General

JOHN C. WALDEN
Senior Assistant Attorney
General
Counsel of Record for the
Respondent

MARY BETH WESTMORELAND
Assistant Attorney General

VICKERS NEUGENT
District Attorney

CERTIFICATE OF SERVICE

I, John C. Walden, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States Mail with proper address and adequate postage to:

Mr. J. Converse Bright
Blackburn, Bright, Edwards
& Dodd
1008 North Patterson Street
Valdosta, Georgia 31601

This 23rd day of February, 1981.

/s/
JOHN C. WALDEN